

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS S. ZIMMERMAN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
PENNSYLVANIA STATE TROOPER	:	
KIRK KIRKLAND,	:	
Defendant.	:	NO.: 98-CV-2248

MEMORANDUM AND ORDER

J. M. KELLY, J.

MARCH 18, 1999

Presently before the Court is Defendant Kirk Kirkland's Motion for Summary Judgment, to which Plaintiff Thomas Zimmerman has not filed a response. For the reasons that follow, Defendant's motion is granted, and judgment is entered in his favor.

I. FACTUAL BACKGROUND

On the evening of August 25, 1996, a man broke into an apartment occupied by Harold Whitley, who was at home with his daughter Stacey and his granddaughter Jessica Long. (Pennsylvania State Police Incident Report of 08/26/96 "08/26/96 Report" at 3.) The man pointed a gun at them and demanded money. Id. Mr. Whitley told the intruder he had no money with him, and the only money he had was located in the bar the Whitleys owned below their apartment. Id. The intruder then began to search throughout the apartment for money, and while he temporarily was distracted, Stacey fled from the apartment with her daughter. Id. As she ran she noticed a man sitting in a black Ford LTD with its motor running. (Supp. to Report of 08/26/96 at 7.) A few moments later the intruder, who failed to find any money, also ran out of the apartment and headed toward the bar where Mrs. Whitley and the Whitley's other daughter Charity were. (08/26/96 Report at 4.) The intruder did not make it into the bar; Mr. Whitley shot

the intruder dead. Id. The man Mr. Whitley shot was identified as Richard Brunner. Id. at 3.

Corporal James A. Nettles conducted the investigation into Brunner's death. Corporal Nettles questioned Stacey the day after the shooting about whether she knew Brunner, and Stacey replied that he lived with her sister Charity. (Homicide Investigation Action Report "Homicide Report" at 14.) Corporal Nettles then interviewed Charity, who admitted she originally planned to rob her parent's bar, but declined to do so when Brunner offered to join her. (Statement of Charity Whitley at 1-2.) Charity apparently believed Brunner would not go ahead with the robbery, but learned otherwise when she emerged from the bar during the commotion caused by the shooting. Id. More importantly, she also identified the driver of the Ford LTD as a man named Tom, who she claimed was Brunner's partner on these types of excursions. Id. at 3. She described Tom in great detail¹ and provided information about where he lived and whom he dated. Id.

Defendant Trooper Kirk A. Kirkland also participated in this investigation, and on October 9, 1996, he questioned Mr. John Famini, who stated he loaned his Ford LTD to Plaintiff Thomas Zimmerman on the night in question. (Arrest Warrant Aff. at 2.) The next day, Trooper Kirkland showed Stacey Whitley a lineup from which she picked Plaintiff as the driver of the Ford LTD. Id. Based upon these facts and others compiled during the investigation, Trooper Kirkland obtained a warrant for Plaintiff's arrest. See id. Trooper Kirkland then served this warrant on Plaintiff, who already was detained in Schuylkill County Prison on unrelated theft

¹She listed his features as including a muscular build, a wooden leg, long and curly hair, with a mustache and beard. Id.

charges.²

Plaintiff eventually was acquitted of all charges in connection to the attempted robbery of the Whitleys' bar. He has sued Defendant pro se, alleging Defendant violated his civil rights by obtaining an arrest warrant despite Stacey Whitley's initially contradictory description of the Ford LTD driver. He claims he has suffered extensive embarrassment and loss through his implication in this crime, and seeks punitive and compensatory damages.

II. DISCUSSION

A. The Summary Judgment Standard

A court properly may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). No genuine issue of material fact exists where there is insufficient favorable evidence for the nonmovant to prevail at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Merely colorable evidence, or evidence that is not significantly probative, is not enough to prevent summary judgment. Id. at 250. Further, a party is entitled to judgment as a matter of law if, similar to a directed verdict under Rule 50(a), the district court can reach only one conclusion under the governing law. Id. It is the moving party's burden to show it is entitled to summary judgment, see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), but this burden is not lifted if the motion is unopposed; the court still must inquire whether the movant is entitled to judgment as a matter of law, see Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 807 (8th Cir. 1993);

²Plaintiff pled guilty to these charges.

Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1517 (1st Cir. 1991).³

B. Plaintiff's Civil Rights Claims

Plaintiff has brought this action under 42 U.S.C. § 1983, and to avoid summary judgment he must have created a record supporting both a deprivation of a federally protected right and that a person acting under the color of state law committed this deprivation. Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997). In his complaint, Plaintiff has alleged his Eighth Amendment rights somehow were violated by Defendant, but, in view of the facts that Plaintiff was neither convicted nor incarcerated for this crime and the Eighth Amendment applies only to sentenced prisoners, Reynolds v. Wagner, 128 F.3d 166, 173 (3d Cir. 1997), this claim is without merit. Plaintiff, however, has alleged Defendant arrested him notwithstanding a contradictory statement from a witness. Liberally construing this pro se plaintiff's allegation, see Becker v. Commissioner of Internal Revenue, 751 F.2d 146, 149 (3d Cir. 1984), and in consideration of his false imprisonment claim, the Court will read his complaint as alleging Defendant arrested him without probable cause, and will analyze the record to determine whether it supports a deprivation of Plaintiff's Fourth Amendment rights.⁴ See Groman v. Township of Manalapan, 47 F.3d 628, 636 (3d Cir. 1995).

³This is not to say Plaintiff can withstand Defendant's motion simply by relying on the fact that his allegations, if true, would state a claim on which relief could be granted. Rather, the record must affirmatively support his allegations. See Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995).

⁴Defendant generously reads the complaint to find Plaintiff possibly has stated a malicious prosecution claim. The Court finds this approach, likely undertaken to be far over-inclusive rather than under-inclusive, has no basis in the complaint. Nowhere has Plaintiff complained about Defendant's actions in any context but the arrest. Absent some allegation, or hint of allegation, about the criminal proceedings, the Court will decline to interpret the complaint as stating a claim for malicious prosecution.

An arrest warrant violates the Fourth Amendment if the officer's application for the warrant was not objectively reasonable. Malley v. Briggs, 475 U.S. 335, 345 (1986). A reviewing court will not presume the officer's application was reasonable merely because a magistrate approved it; the reviewing court must find the officer exercised reasonable professional judgment in making his application. Id. at 345-46. The officer has met this standard if he had a reasonable basis to believe his application established probable cause, i.e. that under all relevant circumstances, there is a fair probability a crime was committed and the person to be arrested committed it. Id. at 343; see also Illinois v. Rodriguez, 497 U.S. 177, 184 (1990).

The record in this case demonstrates Defendant reasonably believed his arrest warrant application established probable cause, and therefore his application was objectively reasonable and did not violate Plaintiff's Fourth Amendment rights. Defendant had substantial reasons to believe Plaintiff was the driver of the Ford LTD Brunner had waiting for him outside the Whitleys' bar: Stacey Whitley picked him from a lineup as the driver; John Famini said he lent Plaintiff his Ford LTD on the night of the attempted robbery; and both Ms. Whitley and another witness, Samuel Pellish, stated Mr. Famini's car looked like the one they saw parked outside the Whitleys' bar. (See Arrest Warrant Aff. at 2-3.) Further, Charity Whitley tied Plaintiff directly to Brunner. (Statement of Charity Whitley at 3.) Defendant's conclusion that his application established probable cause to arrest was in no way undermined by the mere fact that Stacey Whitley initially gave a description that in some respects varied from Plaintiff's actual appearance.⁵ Rather, these discrepancies were but a few of the many factors Defendant was

⁵The day after the incident Stacey Whitley described the driver of the car as a white male in his late 20s to early 30s, with light facial hair, dirty-blond or light-brown shoulder length hair, a bent nose, and a tattoo or design on his elbow. (Supp. to 08/26/96 Report at 7.) Plaintiff did

presented with before deciding to apply for the warrant. Rodriguez, 497 U.S. at 184 (stating the probable cause inquiry considers all circumstances known to the officer at the relevant time); Illinois v. Gates, 462 U.S. 213, 238 (1983). Based upon these facts, which are material and undisputed, the Court finds Defendant reasonably believed his application established probable cause. Compare Sharrar v. Felsing, 128 F.3d 810, 818-19 (3d Cir. 1997) (finding probable cause existed) with Rogers v. Powell, 120 F.3d 446, 453-54 (3d Cir. 1997) (finding district court should not have concluded probable cause existed). Defendant's application therefore was objectively reasonable, no Fourth Amendment violation occurred, and Defendant's motion for summary judgment is granted with respect to Plaintiff's civil rights claim.

C. Plaintiff's State Law Claims and Statutory Immunity

The Court will exercise supplemental jurisdiction over Plaintiff's remaining claims to serve the interests of judicial economy, convenience, and fairness to the parties, particularly Defendant. See Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995). Defendant is entitled to statutory immunity on all of Plaintiff's state claims. In view of the Court's finding that Defendant's application for the warrant was objectively reasonable, and in consideration of the Court's review of the record, the Court can find nothing to suggest Defendant committed a crime or acted with actual fraud, malice, or wilful misconduct. See 42 Pa. Cons. Stat. Ann. § 8850 (West 1998). Cf. In re City of Phila. Litig., 49 F.3d 945, 972-73 (3d Cir.), cert. denied, 516 U.S. 863 (1995). Defendant, therefore, also is entitled to summary judgment on Plaintiff's state law claims.

not disagree with Ms. Whitley's assessment of his approximate age, facial hair, or tattoo, but was emphatic that he did not have long, blonde hair (Ms. Whitley did not claim it was blond) or a bent nose. (Zimmerman Dep. at 20, 46, 49-50.)

An Order follows.

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Plaintiff,	:	
	:	
v.	:	
	:	
PENNSYLVANIA STATE TROOPER	:	
KIRK KIRKLAND,	:	
Defendant.	:	NO.: 98-CV-2248

ORDER

AND NOW, this 18th day of March, 1999, upon consideration of Defendant Kirk Kirkland's Motion for Summary Judgment (Document No. 15), to which Plaintiff Thomas Zimmerman has not filed a response, it is hereby **ORDERED**:

1. Defendant's Motion for Summary Judgment is **GRANTED**;
2. Judgment is entered in favor of Defendant Kirk Kirkland and against Plaintiff Thomas Zimmerman; and
3. The Clerk of Court is ordered to mark this matter closed.

BY THE COURT:

JAMES McGIRR KELLY, J.